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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-1194

J.J. ENOMOTO, et al.,

Petitioners,

vs.

ALEJANDRO R. FERREL, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, by their undersigned attorneys, hereby move pursuant to 53 of the Rules of this Court for leave to file the brief in Opposition To Petition For Certiorari without prepayment of costs and to proceed *in forma pauperis*.

The affidavits of respondent Alejandro Ferrel and William Bennett Turner in support of this motion are annexed hereto.

Dated: April 17, 1975

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

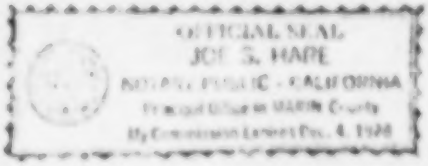
ALEJANDRO R. FERREL, being duly sworn, deposes and says:

1. I am a respondent in the above-entitled case, having been permitted to intervene as a party plaintiff in the district court by stipulation and order filed July 3, 1972. I make this affidavit in support of my motion for leave to proceed in forma pauperis.

2. Because of my poverty I am unable to pay the costs or fees in this case and am unable to give security therefor.

3. I believe in good faith that I am entitled to the redress sought in this case. The nature of the case is fully set forth in the decision of the Ninth Circuit and in the brief in Opposition to Petition for Writ of Certiorari submitted herewith. Briefly, the case involves the right of San Quentin prisoners like myself to be free of arbitrary punishments by

prison officials, and specifically involves the constitutionality of petitioners' disciplinary procedures.



Alejandro R. Ferrel
ALEJANDRO R. FERREL

Sworn to and subscribed before me,

this 21 day of March, 1975.

Joe S. Hape
Notary Public

IN THE SUPREME COURT OF THE UNITED STATES

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN FRANCISCO)

WILLIAM BENNETT TURNER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court. I am serving as an attorney for respondents in the above-entitled case. I make this affidavit in support of respondents' motion for leave to proceed in forma pauperis.

2. This case has been maintained as a class action on behalf of all prisoners confined at San Quentin Prison. The original named plaintiffs were John Wesley Clutchette and George Jackson. John Wesley Clutchette was released from prison. George Jackson is now deceased. Alejandro R. Ferrel was permitted, by stipulation and order filed in the district court on July 3, 1972, to intervene as a party plaintiff and representative of the class of San Quentin prisoners. Mr. Ferrel's in forma pauperis affidavit is submitted

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Alejandro R. Ferrel, et al. [1] file this brief in opposition to the petition for certiorari and pray that the writ be denied.

QUESTIONS PRESENTED

On the merits the questions presented to the courts below were:

1. Whether the consequences of disciplinary proceedings at San Quentin were sufficiently serious to require procedural due process safeguards against error or arbitrariness and, if so, whether San Quentin's disciplinary fact-finding procedures met rudimentary standards of due process.

2. Whether a prisoner accused of misconduct that also constitutes a crime, and whose case is referred to the

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1/ The original named plaintiffs were John Wesley Clutchette and George Jackson, suing on behalf of a class of San Quentin prisoners. By stipulation and order filed July 3, 1972, respondent Alejandro R. Ferrel was permitted to intervene as a party plaintiff and representative of the class. Since Clutchette and Jackson are no longer incarcerated, the style of the case should reflect that Ferrel is the named respondent before the Court.

district attorney for possible prosecution, may be subjected to disciplinary punishment without a hearing that provides safeguards of his Fifth Amendment privilege against self-incrimination, including the right to counsel.

STATEMENT OF THE CASE

The Petition does not adequately describe the present posture of this litigation.

The action was filed in 1970 and the initial decision of the district court was rendered June 21, 1971, on the basis of the evidence then before it. Clutchette v. Procunier, 328 F.Supp. 767 (N.D. Cal. 1971). Petitioners -- the defendant prison officials -- then appealed, but the appeal was not decided until April 25, 1974. Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974). Rehearing was held to consider the effect of Wolff v. McDonnell, 418 U.S. 539 (1974), and a modified opinion on rehearing was issued October 21, 1974. 510 F.2d. 613 (9th Cir. 1974). Rehearing en banc was denied on February 28, 1975.

During the lengthy appeal process, three events occurred which significantly affect whether this Court's certiorari jurisdiction should be exercised:

(1) The petitioner officials submitted a new and different disciplinary Plan to the district court and claimed that the Plan met the requirements of that court's decision. The Plan was first submitted on October 28, 1971. An amended Plan was filed on January 4, 1972, and another amended Plan was filed, after certain discovery by respondents, on May 15, 1972. After remand by the Ninth Circuit, a Second Amended Plan was filed on January 20, 1975, and is presently before the district court. Respondents have objected to certain aspects of the latest Plan, but the district court has not yet ruled thereon. None of the new plans was in the record before the Ninth Circuit (see 497 F.2d at 817, n. 11), and thus none is before this Court.

(2) As petitioners concede (Petition, p. 7), they voluntarily implemented a new disciplinary Plan shortly after the district court's decision. Moreover, they have now implemented a revised Plan (Appendix to Petition, pp. ix-xxviii) and have contended before the district court that it fully complies with due process requirements. Therefore, San Quentin has actually been operating under new disciplinary plans for more than three years. Petitioners have not, at least not yet, been ordered to do anything they are not doing voluntarily. If the district court rules that the Plan now before it is in any way deficient and requires modifications, petitioners may appeal from that order. Accordingly, the present petition is premature. Only when the district court enters a final order approving or disapproving the Plan can it be determined what is actually at stake on review.

(3) The evidentiary record on this petition is stale. The evidence on which the district court rendered its decision was presented in 1970 and involved an older disciplinary Plan that has now been discarded by petitioners. 2/ But in connection with the newer plans that have been submitted, both in 1972 and again in 1975, respondents have done a substantial amount of discovery relating to the actual operation of the plans. The results of this discovery have been presented as new evidence to the district court. New evidence was also submitted to that court by petitioners as recently as March 7, 1975. None of the new evidence is in the record on the instant petition. As mentioned above, the district court has not yet rendered a decision, on the basis of all the evidence presented, either

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2/ Petitioners do not contend, nor could they, that the old plan struck down by the courts below complies with the minimum due process specified in Wolff v. McDonnell, 418 U.S. 539 (1974).

approving or disapproving petitioners' Plan. When it does, the case will then be ripe for review.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioners seek a writ of certiorari on the ground that the Ninth Circuit has "unduly constrained the discretion" of prison officials recognized in Wolff v. McDonnell, supra (Petition, p. 6). Petitioners do not assert that there is any conflict between the circuits. We submit that certiorari should be denied because (a) the state of the record and the pendency of proceedings in the district court render inappropriate the exercise of this Court's certiorari jurisdiction, and (b) the decision sought to be reviewed is not in conflict with Wolff.

A. Exercise Of The Court's Certiorari Jurisdiction Would Be Inappropriate In The Present Posture Of This Case

As set forth in the Statement of the Case, there have been further proceedings in the district court since the order from which petitioners have appealed. While the appeal was pending petitioners submitted a new and different disciplinary Plan to the district court. Moreover, they voluntarily implemented such a Plan and San Quentin has now been operating under it for several years. Not only is the Plan not in the record which petitioners present for review, but substantial new evidence has been presented by both sides to the district court, and this evidence relates to the actual operation of the Plan in recent years. Finally, the district court has not ruled on the Plan as submitted, either approving it or disapproving it or ordering modifications. If the district court approves the Plan, as petitioners have urged it to do, review by this Court of the Ninth Circuit's decision would be entirely pointless; the Court would be asked to decide abstract questions and render an advisory opinion, because petitioners cannot legitimately

complain that they have been ordered to do anything they are not already doing voluntarily. 3/ If, on the other hand, the district court should disapprove any part of the plan and order modifications, there will be time enough for petitioners to appeal from such a final order and review could then proceed on the basis of a complete evidentiary record. This Court's certiorari jurisdiction should not be exercised on a stale record when the only live issues are still pending before the district court.

B. The Ninth Circuit's Decision Is Not In Conflict With Wolff v. McDonnell

Petitioners' contention that the Ninth Circuit's decision is not consistent with Wolff v. McDonnell, 418 U.S. 539 (1974), was carefully considered by the Ninth Circuit on rehearing. The court rejected this contention, and even dissenting Judge Kilkenny did not point out any respect in which the decision is not in accord with Wolff (Appendix to Petition, pp. vi-vii) 4/ Further, this Court itself recognized that Wolff was not the definitive and final word on due process in prison, stating that Wolff's conclusions were "not graven in stone". 418 U.S. at 572. That the Court did not mean to stifle development in this field, or necessarily to disagree with the conclusions reached by the Ninth Circuit, can be seen from its discussion of the law in the various circuits. 418 U.S. at 572, n. 20. While extensively discussing the Ninth Circuit's decision,

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3/ Furthermore, the Ninth Circuit has held that its decision in Clutchette is prospective only, Wheeler v. Procunier, 508 F.2d 888 (9th Cir. 1974), so the only real issue is what San Quentin's disciplinary procedures will be in the future; this is the issue pending before the district court.

4/ Judge Kilkenny would merely have remanded to the district court for a determination of whether the current plan complies with Wolff. This is essentially what the district court presently has before it.

the Court did not overrule or even disapprove it. Surely, if the Court's position were fixed and it deemed the Ninth Circuit's decision to be inconsistent with its own in Wolff, it would have taken the obvious opportunity to say so.

Moreover, the instant case can easily be reconciled with Wolff because it is distinguishable on the facts. In Wolff this Court carefully examined the Nebraska statutory and administrative provisions governing disciplinary proceedings, as well as the testimony in the record as to how they worked in practice. The Court referred to the warden's testimony that a "great number" of disciplinary cases were "resolved without contest" and many inmates admitted guilt to an investigator. 418 U.S. at 552, n. 10. The Court naturally concluded that it would be inappropriate to require much due process in such cases. In the present case, however, respondents have expressly disclaimed any interest in requiring due process hearings except in cases in which there are real factual disputes and the consequences are serious. Moreover, the disciplinary consequences to prisoners are more serious in California than in Nebraska, and California prisoners suffer greater "grievous losses". Thus, until the district court's decision in this case, California prisoners could be subjected not only to isolation (the apparent equivalent of solitary confinement in Nebraska), but also indefinite confinement to segregation, referral to the parole board for reconsideration or denial of parole, assessment of damages or forfeiture of the prisoner's earnings and referral to the district attorney for prosecution. See Clutchette v. Procunier, 328 F.Supp.at 775-77. These serious consequences did not befall Nebraska prisoners and were not presented in Wolff.

Petitioners argue that the Ninth Circuit's decision goes beyond Wolff in four respects: (1) An "absolute right to

counsel", (2) the ability to call witnesses, (3) confrontation and cross-examination and (4) a decision based on the evidence presented. But careful analysis of the Ninth Circuit's decision discloses no inconsistency with Wolff.

1. Right To Counsel In Criminal Proceedings

Before the district court's decision in this case, the practice at San Quentin in cases of alleged felonies was to bring the accused prisoner before the Disciplinary Committee, inform him that his case might be referred to the District Attorney and give him the standard Miranda warnings, including his right to remain silent, his right to counsel and the fact that anything he says at the disciplinary hearing "will be used against him at his subsequent trial." Clutchette v. Procunier, 328 F.Supp. at 778. If the prisoner asked for assistance of counsel (even if he had retained counsel), he was told that this right attached only when he was questioned by the District Attorney. If he chose to remain silent, the Disciplinary Committee proceeded nonetheless to adjudicate his case, with the prisoner disabled from making any defense. The district court concluded that "the trap is unavoidable" -- the prisoner was required either to (1) remain silent and sacrifice any defense to the disciplinary charge, or (2) speak in his own defense and risk self-incrimination in a later criminal prosecution.

This procedure was condemned by the courts below as failing to protect the accused's privilege against self-incrimination. As a result of the district court's decision, petitioners have altered their procedure by postponing disciplinary actions until the completion of criminal proceedings.

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This was an option suggested by the Ninth Circuit. 497 F.2d at 823. 5/ While petitioners now complain that this solution "is not entirely satisfactory" (Petition, p. 8), this matter is presently pending before the district court, on an up-to-date evidentiary record, and is not ripe for review by this Court.

Petitioners' strained attempt to argue that this issue was decided by Wolff, even though never adverted to by this Court, must fail. The Ninth Circuit rejected this argument, as did the First Circuit. See Palmigiano v. Baxter, 410 F.2d. 534 (1st Cir. 1974). The issue is too distinct from conventional due process analysis to have been decided sub silentio, and too many decisions of this Court, relied on by the Ninth Circuit, would have to be qualified to reach the result sought by petitioners. The Court certainly cannot be deemed to have decided this knotty question of custodial interrogation without any discussion of it at all. The plain truth of the matter is that the issue was never addressed in Wolff, and the decision below is therefore not in any way inconsistent with Wolff.

In conclusion we point out that other courts have taken varying approaches to similar problems. In Palmigiano v. Baxter, supra, and Roberts v. Taylor, ___F.Supp.___, No. 5075 (D.R.I. Feb. 25, 1975), the courts ordered that "use immunity" be provided to prisoners faced with disciplinary proceedings involving criminal conduct, so that they could defend themselves

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5/ Since petitioners contend that such postponement of disciplinary proceedings is permissible, their assertion that the Ninth Circuit ordered an "absolute" right to counsel is misleading. Further, even if petitioners elected not to postpone the proceedings, the courts below required counsel only in those disciplinary cases in which the accused can be criminally prosecuted. It is true, as petitioners state, that one of the common disciplinary offenses in prison is possession of a weapon, which is also a felony under the California Penal Code (Petition, pp. 9-10). (Petitioners' assertion that there are few criminal prosecutions for possession of a weapon is not supported by anything in the record of this case.) Petitioners fail to point out that murder is also alarmingly common in California prisons, and they do not assert that prosecutions for murder are rare. Evidence regarding disciplinary proceedings in murder cases has now been presented to the district court but is not in the record before this Court.

without fear of self-incrimination. Cf. Fowler v. Vincent, 366 F.Supp. 1224 (S.D.N.Y. 1973). The California Supreme Court recently held that use immunity must be afforded in the analogous situation of probation revocation, when the hearing is held before the criminal trial for the same conduct. People v. Coleman, ___C.3d.___, Crim. No. 17822 (April 3, 1975). 6/ Cf. Melson v. Sard, 402 F.2d. 653, 655 (D.C. Cir. 1968) (parole revocation). Another court decided that principles of double jeopardy might come into play, and ruled that acquittal of the criminal charges barred administrative prison punishment. Barrows v. Hogan, 379 F.Supp. 314 (M.D. Pa. 1974); compare Clutchette v. Procunier, 328 F.Supp. at 778. In other words, the lower courts are beginning to suggest different approaches to the problem. In these circumstances, Justice Frankfurter's observation is pertinent:

> "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." State of Maryland vs. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

This is doubly true in the present case, where this entire issue is still pending before the district court.

2. Ability To Call Witnesses

Wolff stated that while prisoners have a right to call witnesses on their behalf, this right is not "unrestricted", "at least on the record made in this case." 418 U.S. at 566 We have never contended that there is an absolute or unrestricted right to call witnesses. We have presented evidence to the district court to show that petitioners in practice never

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6/ The Coleman decision contains a scholarly discussion of the threats to the Fifth Amendment privilege posed not only by probation hearings but also by prison disciplinary proceedings. The Court concluded that prison disciplinary cases presented the extreme situation of providing only minimal procedural rights while at the same time having the potential of imposing serious personal deprivations (Slip op. p.27).

allow prisoners to call any witnesses. On the other hand, petitioners have proposed to the district court that their Plan, which authorizes the officials to prohibit calling of witnesses in many circumstances, is authorized by Wolff. As noted above, the district court has not yet ruled on this question, and there is no reason for this Court to rule on it on the present record.

3. Confrontation and Cross-Examination

Wolff concluded that prisoners do not generally "at the present time" have the right to confront and cross-examine witnesses. 418 U.S. at 568. 7/ The Court emphasized, however, that prison practices in this area are now "diverse" and in the "experimental" stage. Id. at 569. The Court concluded that whether to grant confrontation and cross-examination in individual cases would be committed to the "sound discretion of the officials of state prisons." Id.

Nothing in the Ninth Circuit's decision is inconsistent with the Court's holding in Wolff. The Ninth Circuit merely specified a "method by which the soundness of the discretion [accorded by Wolff] could be subjected to scrutiny", by requiring that the officials state the reason for denying these rights in individual cases. Accord, Daigle v. Hall, 387 F.Supp. 652 (D. Mass. 1975). This will significantly aid in the "experimental" development of due process procedures recognized by this Court. Rather than have the courts speculate about whether confrontation helps or hurts in maintaining prison discipline, there will be a record in each case. The Ninth Circuit specified that the problems of protecting informers should in the first

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7/ Since Nebraska prisoners, involved in Wolff, were in fact allowed to question the charging party in their proceedings, 418 U.S. at 567, n. 1 the Court's conclusion might be considered largely dictum.

instance be worked out by the prison officials and, in fact, this matter is before the district court in the Plan presented by petitioners. Again, there is no conflict with Wolff requiring review by this Court.

4. Decision Based On The Evidence Presented

Petitioners concede that implicit in Wolff "is the principle that the accused inmate must be afforded an opportunity to reply to any evidence against him upon which the Disciplinary Committee may rely in reaching its decision" (Petition, p. 19). The reason of course is that due process does not permit findings of fact to be made on evidence kept secret from the accused, which he has no opportunity to meet. There may be extraordinary circumstances in which, as Wolff recognized, the statement of the evidence relied upon "may properly exclude certain items of evidence", 418 U.S. at 565, but this must be the exception and not the rule. Disciplinary hearings would be a sham if the decisionmakers were authorized routinely to make ex parte determinations without giving the accused an opportunity to know and possibly rebut the evidence used against him. We do not understand petitioners to contend otherwise, and we see no conflict with Wolff.

CONCLUSION

For the reasons stated, the writ of certiorari should be denied.

Respectfully submitted,

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